Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

NELLIE HOWARD,

Petitioner,

v.

KATHY ANDERSON, KPMG PEAT MARWICK,
AND KPMG PEAT MARWICK LLP,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED FOR REVIEW

1. **Whether the Second Circuit Court of Appeals in *Howard v. Anderson*, Docket No. 97-7044 (filed June 3, 1997) in dismissing the Petitioner's appeal was correct in applying the rules of the Federal Arbitration Act in determining whether the Second Circuit had jurisdiction to hear the Petitioner's appeal of the district court's order compelling Petitioner to arbitrate a dispute with her former employer.**

2. **Whether the Second Circuit was correct in treating the district court's order as other than a "final decision" within the meaning of Section 16(a)(3) of the Federal Arbitration Act even though the district court had referred all claims to arbitration.**

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BASIS FOR JURISDICTION

The order of the Court of Appeals panel was issued on June 3, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions are listed below and are included in the appendix:

A. Section 1 (9 U.S.C. §1), "*Maritime transactions" and "commerce" defined; exceptions to operation of title*

B. Section 2 (9 U.S.C. §2), *Validity, irrevocability, and enforcement of agreements to arbitrate*

C. Section 16 (9 U.S.C. §16), *Appeals*

D. Civil Rights Act of 1991, Section 118, *Alternative Means of Dispute Resolution,* Pub. L. No. 102-166, 105 Stat. 1071, 1081.

MATERIAL FACTS

Recently employers and even whole industries have sought to circumvent civil rights laws by forcing employees to sign away the fundamental rights to a court hearing. A glaring, but not atypical, example of this abuse is the case in point.

Here Respondent KPMG Peat Marwick presented Petitioner with a mandatory arbitration agreement over six weeks after she had begun employment with KPMG. This was almost three months after she had signed a Letter Agreement with KPMG specifying the terms of her employment and over six weeks after her orientation when she signed several additional KPMG documents. At no time prior to the presentation of the agreement containing the arbitration clause had any one at KPMG mentioned an arbitration requirement to Petitioner.

Petitioner had been an attorney in the Office of Chief Counsel of the National Office of the Internal Revenue Service for over thirteen years when she met, on March 3, 1993, with Kathy Anderson, a partner in KPMG's New York Office, and other KPMG employees to discuss the possibility of employment. Over the course of the next few months, Petitioner spoke and/or met with Ms. Anderson and other KPMG employees several times.

At no time, did any KPMG personnel mention to Petitioner that she would be required to arbitrate anything.

On August 6, 1993, KPMG faxed Petitioner a letter with that date, "Letter Agreement," in which KPMG offered Petitioner a position as a senior tax manager. The letter described Petitioner's compensation, benefits, job title, relocation package and company policies. The Petitioner signed

and dated the letter and returned it to KPMG.

In reliance on the Letter Agreement, Petitioner resigned from her job with the Internal Revenue Service in August 1993 and moved to New York City in September 1993. On September 16, 1993, Petitioner arrived at the offices of KPMG and signed several KPMG documents, none of which mentioned an arbitration clause.

In November 1993, KPMG presented to Petitioner a Senior Manager's Agreement dated September 20, 1993, which contained provisions not previously known to Petitioner, including an arbitration clause. Petitioner signed and returned the agreement several months later.

In 1993, all Senior Managers at KPMG's New York office were given a Senior Manager's Agreement to execute after the commencement of their employment with KPMG and after the circulation to them of an offer letter prior to the commencement of their employment. As of June 3, 1996, that was still the case.

On or about October 25, 1994, Petitioner's employment with KPMG was terminated. On or about February 7, 1996, Petitioner filed a complaint in the district court for damages for gender and race discrimination, intentional and negligent infliction of emotional distress, negligent supervision, fraud and misrepresentation: 96 Civ. 919 (SWK). On April 23, 1996, Respondents brought a motion to stay judicial proceedings pending arbitration.

On October 16, 1996, the district court granted the Defendants' motion, pursuant to Section 3 of the FAA (9 U.S.C. section 3), to stay judicial proceedings pending arbitration of all claims.

In a Notice of Appeal dated November 14, 1996, Petitioner appealed the district court's order to the Court of Appeals for the Second Circuit. On March 24, 1997, Respondents filed a Motion for Dismissal for Lack of Jurisdiction and for Sanctions for a Frivolous Appeal. After a pre-argument conference, the Second Circuit without opinion, on June 3, 1997, granted the Respondent's Motion for Dismissal. The Second Circuit denied Respondents' Motion for Sanctions for filing a frivolous appeal.

Petitioner was represented by counsel Gregory L. Reid, Esq., 19 Audrey Avenue, Mount Vernon, NY 10553, in the district court. Because she is an attorney representing herself on appeal to the Second Circuit, her appeal to the Second Circuit was processed through the Civil Division and not the *Pro Se* Office.

Federal jurisdiction in the district court arose under Title VII of the Civil Rights Act of 1964, as codified 42 U.S.C. section 2000e *et seq.* (amended in 1972, 1978, and by the Civil Rights Act of 1991, Pub. L. No. 102-166) and under the Civil Rights Act of 1866, 42 U.S.C. section 1981, as well as under 28 U.S.C. sections 1331 and 1343 and the doctrine of pendent jurisdiction.

REASONS FOR GRANTING CERTIORARI

The Supreme Court of the United States should grant this petition for a writ of certiorari because:

1. There is mass confusion in the courts below about the enforceability of agreements to arbitrate Title VII claims. This confusion is being compounded by employers

erroneously misreading Supreme Court precedent in this area. The result has been growing employee resistance manifested by protracted litigation challenging arbitration and by unrelenting backlash from all segments of American society.

2. The United States Court of Appeals for the Second Circuit has endorsed the application of a methodology of statutory construction which places an impermissible restriction upon Petitioner's right to appeal in this case:

2A. The Second Circuit has endorsed an interpretation of the Federal Arbitration Act that is in clear conflict with the Supreme Court decision announced in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 111 S. Ct. 1647 (1991), that arbitration may not be mandated in respect of a claim if the claimant meets her burden of showing that Congress in enacting the statute under which the claim arises intended to preclude arbitration of claims under that Act.

2B. The United States Court of Appeals for the Second Circuit has affirmed a district court order whose premise is in conflict with decisions of the United States Court of Appeals for the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (1994), *cert. denied*, 116 S. Ct. 61 (1995), and *Renteria v. Prudential Insurance Company of America*, 113 F.3d 1104 (1997). The

Second Circuit and the Ninth Circuit have arrived at opposing conclusions about the meaning and interpretation of the Federal Arbitration Act and Title VII of the Civil Rights Act of 1964. The conflicting philosophies of the two circuits are not resolved by application of the principles of statutory interpretation described by this Court.

2C. The Second Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent regarding the exception in the Federal Arbitration Act for arbitration clauses in employment contracts.

3. The Second Circuit has entered a decision in this case in conflict with the decision of the United States Supreme Court in *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945 (1988). This Court in *Van Cauwenberghe* unambiguously defined a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

DISCUSSION

1. **There is mass confusion in the courts below about the enforceability of agreements to arbitrate Title VII claims. This confusion is being compounded by employers erroneously misreading Supreme Court precedent in this area. The result has been growing employee resistance manifested by protracted**

litigation challenging arbitration and by unrelenting backlash from all segments of American society.

The issue of mandatory arbitration has received much attention at the Equal Employment Opportunity Commission ("EEOC"), in Congress, at the National Association of Securities Dealers ("NASD"), in the courts, at the American Arbitration Association and the National Academy of Arbitrators and in the media.

Equal Employment Opportunity Commission ("EEOC"): In light of the EEOC's active involvement in issues concerning arbitration agreements in employment contracts, Petitioner believes that the EEOC would enter this case as a friend of the court should the Supreme Court grant this petition for a writ of certiorari.

In a number of cases litigated around the country, the EEOC has taken the position that mandatory arbitration of statutory claims which is imposed as a condition of employment is unenforceable. *See, e.g., Duffield v. Robertson Stephens & Co.*, No. C-95-0109-EFL (N.D. Cal.) (*amicus* brief filed by EEOC); *Cosgrove v. Shearson Lehman Bros.*, No. 95-3432, 1997 WL 4783 (6th Cir. 1997) (*amicus* brief filed by EEOC); *EEOC v. River Oaks Imaging & Diagnostic*, Civ. A. H-95-75 (S.D. Tex.); *EEOC v. Midland Food Services*, LLC, No. 1:96-MC-107 (N.D. Ohio); *Johnson v. Hubbard Broadcasting, Inc.*, No. 4-96-cv-4-96-Cv-107 (D. Minn.) (*amicus* brief filed by EEOC). The EEOC, just this year, issued a policy statement opposing mandatory arbitration as a condition of initial or continued employment: *EEOC Policy Statement on Mandatory*

Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915.002 (July 10, 1997).

Congress: On March 6, 1997, Representative Edward J. Markey (D-Mass.), with Representative Connie Morella (R-Md.), introduced H.R. 983, *The Civil Rights Procedures Protection Act*: A bill to amend certain Federal Civil Rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, national origin, age, or disability, and for other purposes. Representative Markey explained the purpose of the bill as follows:

> Our legislation would protect the rights of workers to bring claims against their employers in cases of employment discrimination. By amending seven Federal civil rights statutes to make it clear that the powers and procedures provided under those laws are the exclusive ones that apply only when a claim arises, the Civil Rights Procedures Protection Act would prevent discrimination claims from being involuntarily sent to binding arbitration.

143 Cong. Rec. E408 (March 6, 1996) (statement of Congressman Markey).

To date the bill has not come out of either committee and it may be some time before it does. Also, as with any bill, there is the strong possibility that the bill will never be enacted. In this regard it is notable that a similar bill S. 366 was introduced in 1995 by Senator Russel D. Feingold. *See* 141 Cong. Rec.

S2271-72 (daily ed. Feb. 7, 1995) (statement of Senator Feingold).

National Association of Securities Dealers ("NASD"):

In June 1997, the NASD proposed a new rule, which would allow brokers to choose between entering into private arbitration agreements with their employers with respect to statutory discrimination claims, or reserving the right to file a case in federal or state court. The NASD's decision followed pressure by members of Congress, as well as civil rights advocates and plaintiffs' attorneys, who objected to the current mandatory arbitration system at a special NASD advisory committee hearing in June. SEC Commissioner Isaac C. Hunt had called for the change to the NASD's system. Among the other organizations that argued against the current system were the National Women's Law Center, the American Civil Liberty Union's Workplace Rights Project, and the Women's Legal Defense Fund. Sec. Reg. & L. Rep., Federal News, *Arbitration: Elimination of Mandatory Arbitration of Discrimination Claims Proposed by NASD,* Aug. 8, 1997.

The NASD made this modification despite the fact that mandatory arbitration agreements signed in registration with the Association were being enforced by the courts in respect of employment disputes. *See, e.g., Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60 (2d Cir. 1996), *Kidd v. Equitable Life Assurance Soc'y of the U.S.*, 32 F.3d 516 (11th Cir. 1994), *and Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (1995).

The Courts: Lower courts in an effort to ameliorate the consequences of mandatory arbitration agreements have begun

to more closely scrutinize these arrangements.

In *Berger v. Cantor Fitzgerald Securities*, 942 F. Supp. 963 (S.D.N.Y. 1996), Judge Scheindlin denied the defendant's motion to compel arbitration, pending discovery by the plaintiff on his claims that the parties' agreement to arbitrate was obtained by misrepresentation, high pressure tactics and unfair dealing. The same district court had in similar circumstances earlier resolved motions to compel arbitration without recourse to discovery.

In *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (1994), *cert. denied,* 116 S. Ct. 61 (1995), and *Renteria v. Prudential Insurance Company of America*, 113 F.3d 1104 (1997), the Ninth Circuit refused to enforce arbitration agreements that were not "knowingly" signed.

The American Arbitration Association and the National Academy of Arbitrators: Both associations have said that they do not want their members to hear cases in which the "odds are stacked." Roy Furchgott, *Opposition Builds to Mandatory Arbitration at Work*, N.Y. Times, July 20, 1997, at 11. George Nicoalau, recent past president of the National Academy of Arbitrators, has said: "Many employers have adopted arbitration plans. Many are mandatory, and many are quite unfair." *Id.*

The Media: Numerous articles and television shows have discussed the pros and cons of arbitration clauses in employment contracts. The most notable of these was the *20-20* program on the ABC network that aired on Friday, April 4, 1997.

2. The United States Court of Appeals for the Second Circuit has endorsed the application of a methodology of statutory construction which places an impermissible restriction upon Petitioner's right to appeal in this case.

Background: At the core of this appeal is the issue of the applicability of the FAA to arbitration clauses in employment contracts. It has long been the Second Circuit's position that arbitration clauses in employment contracts are enforceable under the FAA. *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) and *also Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133 (2d Cir.), *aff'g* 148 F. Supp. 521, 523 (1957). In Petitioner's Memorandum of Law in Opposition to Motion For Dismissal & For Sanctions, filed in the Second Circuit on April 7, 1997, Petitioner reserved her right to argue this issue:

> The district court has found that we have here an arbitration that is that subject of the FAA. However, the whole point of this appeal is that we do not. I [Petitioner] will be willing to further brief the court on this issue if it finds this necessary in order to rule on this motion.

See n.1 of the memorandum.

2A. The Second Circuit has endorsed an interpretation of the Federal Arbitration Act that is in clear conflict with the Supreme Court decision announced in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 111 S. Ct. 1647 (1991), that arbitration may not be mandated in respect of a claim if the claimant

meets her burden of showing that Congress in enacting the statute under which the claim arises intended to preclude arbitration of claims under that Act.

In *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 111 S. Ct. 1647 (1991), the Supreme Court found that Gilmer's claim under Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. 621 *et seq.*, could be subjected to compulsory arbitration because "Gilmer ha[d] not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.* At 1657.

Whatever might be the case with claims under the ADEA, Congress intended that claims brought under Title VII would not be the subject of compulsory or mandatory arbitration.

Section 118, titled *Alternative Means of Dispute Resolution*, of the Civil Rights Act of 1991, provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . is encouraged . . . ." (Emphasis added.)

The "[w]here appropriate" qualifier is explained in the House Report that accompanied the Civil Rights Act of 1991. In rejecting a Republican substitute that had included a provision encouraging the use of alternative means of dispute resolution in place of judicial resolution of Title VII claims, the House Committee on Education and Labor stated:

> The Republican substitute . . . encourages the use of such mechanisms 'in place of judicial

> resolution.' Thus, under the [Republican substitute] employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII-complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. (Citations omitted.)

H.R. Rep. No. 102-40(I), at 104 (1991)—section titled **IV.** Additional Amendments Considered and Rejected at the Committee Mark-up, **A.** Republican Substitute, **7.** *Forfeiture of Right to Sue.*

In the *Overview and Purposes* section to the Report, the Committee further stated that the purpose of the 1991 Act was to "respond to the Supreme Court's recent decisions by restoring federal civil rights protections against employment discrimination."

In a section of the House Report specifically entitled *Alternative Means of Dispute Resolution,* at page 635, the Committee continued:

> The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude

> the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co. [sic]* 415 U.S. 36 (1974).

Representative Edwards, the Chairman of the House Committee on Education and Labor, added:

> This section is intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights.

13 Cong. Rec. H9505-01, *H9530.

2B. The United States Court of Appeals for the Second Circuit has affirmed a district court order whose premise is in conflict with decisions of the United States Court of Appeals for the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299, *cert. denied*, 116 S. Ct. 61 (1994), and *Renteria v. Prudential Insurance Company of America*, 113 F.3d 1104 (1997). The Second Circuit and the Ninth Circuit have arrived at opposing conclusions about the meaning and interpretation of the Federal

Arbitration Act and Title VII of the Civil Rights Act of 1964. The conflicting philosophies of the two circuits are not resolved by application of the principles of statutory interpretation described by this Court.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991), the Supreme Court, in finding that ADEA did not preclude arbitration, examined the entire arbitration arrangement under challenge in light of ADEA's statutory scheme. The court reviewed the making of the arbitration agreement, the terms of the agreement, and the procedure for enforcing the agreement. The Court implied that a successful challenge to arbitration could be mounted where the making of the arbitration agreement involved coercion or fraud. *Id.* at 33. Implicit in the Court's analysis was the belief that permissible arbitration arrangements may not undermine the relevant statutory scheme and the policy considerations undergirding them.

This approach was also taken by the Court of Appeals for the District of Columbia Circuit *in Cole v. Burns International Security Services*, 105 F.3d 1465 (D.D.C. 1997), and by the United States Court of Appeals for the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (1994), *cert. denied,* 116 S. Ct. 61 (1995), and *Renteria v. Prudential Insurance Company of America*, 113 F.3d 1104 (1997).

Unlike the Supreme Court in *Gilmer,* the District of Columbia Circuit in *Cole,* in upholding the arbitration agreement, did not consider the issue of fraud or coercion

issues concerning the making of the contract. The court was clear that it had not been asked to examine all facets of the arbitration arrangement. (*See Cole* at 1473 n.4, in which the court observed that the case did "not present" nor was the court deciding "any issue with regard to the validity of the waiver of a jury trial in a case that proceeds in court.") However, Chief Judge Harry T. Edwards did reiterate the *Gilmer* standard that if arbitration agreements are to be enforced they cannot "undermine the relevant statutory scheme." *Cole* at 1468.

In *Renteria v. Prudential Insurance Company of America*, 113 F.3d 1104 (1997), the Ninth Circuit concluded that a Title VII plaintiff may only be forced to her statutory remedies and arbitrate her claims if she has knowingly agreed to submit those disputes to arbitration, whether they be claims brought under Title VII or under parallel state anti-discrimination laws:

> This `knowing waiver' requirement, which we concluded was `apparent from the text and legislative history of Title VII,' . . . `reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statues'—`a policy that is at least as strong as our public policy in favor of arbitration.'

Id. at 1106 (quoting *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (1994), *cert. denied,* 116 S. Ct. 61 (1995) (citations omitted)).

In molding its policy with respect to the balancing of the public policy in favor of arbitration against the public policy of protecting the victims of discrimination under Title VII, the *Lai*

court earlier had found support in the legislative history of the Civil Rights Act of 1991. *Lai* at 1304. Of particular note were commentary of Senator Robert Dole ("[T]he arbitration provision in section 118 encourages arbitration only] where the parties knowingly and voluntarily elect to use these methods.") and of the House Committee on Education and Labor—

> [A]ny agreement to submit disputed issues to arbitration, . . . in an employment contract, does not preclude relief under the enforcement provisions of Title VII.

137 Cong. Rec. S15472, S15478 (Daily Ed. October 30, 1991) (statement of Senator Dole) and H.R. Rep No 102-40(I) (1991) at 104, respectively (emphasis added).

The Second Circuit, as evidenced by its dismissal of Petitioner's appeal from the district court, and the Ninth Circuit have reached different conclusions on the issue of whether the public policy of protecting victims of discrimination through the provisions of Title VII are at least as strong as the public policy in favor of arbitration.

The district court below had allowed normal contract law to trump Title VII, concluding that the arbitration arrangement in this case was governed by the FAA in all events--even though the Petitioner has argued that Respondents had induced her to sign away her Title VII rights through fraud. *See* Appendix B, n.6 *infra* (district court's order). The district court had lumped Petitioner's Title VII claims in with her common law claims, giving no special deference to Title VII's public policy in favor of protecting victims of discrimination.

When the Petitioner appealed her case to the Second Circuit, the Respondents made a motion *under Section 16* of

the Federal Arbitration Act for dismissal of the appeal for lack of jurisdiction. The Second Circuit, without any opinion, granted Respondents' motion to dismiss Petitioner's appeal. However, since Section 16 of the FAA only governs the appealability of agreements that come within the scope of the FAA, the only logical inference that can be drawn is that the Second Circuit agrees with the district court's determination that the issues below were solely governed by the FAA.

Under the approach of *Renteria* and *Lai*, the Petitioner's appeal of the district court's order in respect of the arbitrability of her Title VII claims should have been allowed. Those cases stand for the proposition that if an agreement to arbitrate employment disputes is to be enforceable, the waiver of statutory rights is essential information to which an employee should be privy when the deal is struck between the employer and the employee. That way the employee knows the terms and conditions of her employment, and can decide accordingly whether this a bargain to which she wants to agree.

The Petitioner asserted in the district court that she was fraudulently induced to agree to arbitration. She asserted that did not "know" about the arbitration clause when she received her first agreement from the Respondents: the Letter Agreement setting forth the terms of her employment with the Petitioner. She asserted that she did not "know" about the arbitration clause when she resigned her job and moved to New York so that she could accept a position with KPMG, or when she came to the KPMG New York offices to sign additional agreements in the week before her employment with the Respondents began. She asserted that she did not know of the arbitration clause when she began employment at KPMG. She

asserted that she did not learn of the agreement until more than six weeks after her employment had begun. KPMG did know, even before they sent her the first agreement, that she would be handed that arbitration clause some time after she had committed to and begun to work for that company. KPMG conceded in an affidavit filed in the district court that Petitioner's experience was consistent with KPMG's practice. *See* Appendix D *infra.*

By dismissing the Petitioner's appeal as to whether her Title VII claims are arbitrable, the Second Circuit, in effect, has concluded that they are, and that the policy underlying the FAA outweighs the policy underlying Title VII.

2C. The Second Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent regarding the exception in the Federal Arbitration Act for arbitration clauses in employment contracts.

Section 2 of the Federal Arbitration Act ("FAA") (9 U.S.C. section 2) provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 1 (9 U.S.C. section 1) provides the following exception to Section 2: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

A number of circuit courts have interpreted this exception using *ejusdem generis* without regard to a close examination of its history. However, the Federal Arbitration Act must be read in the historical context in which it was developed.

The Federal Arbitration Act was a commercial arbitration law introduced by the American Bar Association on December 22, 1922. It concerned disputes between growers, packing houses, and shippers. A list of 28 commercial organizations was entered upon the record of the hearing before the Senate subcommittee in support of the law, 13 of which were fruit, vegetable or poultry packers, shippers or commercial agents. *See* Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 3 (1923).

The exception for employment contracts was conceived when an unanticipated and unnecessary obstacle to achieving the supporters was encountered: the unions, fearing that their employment contracts would be swept within the coverage of the bill vehemently objected to its enactment. Spearheading this movement was Andrew Furuseth, President of the International Seamen's Union, who wrote to ABA representative W.H.H. Piatt expressing his concerns. *Id.* at 14. At the hearings for the bill, Mr. Piatt wondered concerning Mr. Furuseth's interpretation of the bill:

> It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what

> their damages are, if they want to do it. Now, that is all there is in this.

Id. at 14. Mr. Piatt suggested the addition of the qualifier "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce" to ensure that employee contracts would not be covered. *Id.*

On this same date, Herbert Hoover, then Secretary of the Department of Commerce, wrote to the Senate subcommittee:

> *If objection appears to the inclusion of workers' contracts in the law's scheme*, it might be well amended by stating `but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class or workers engaged in interstate or foreign commerce.'

Letter from Herbert Hoover, Secretary of the Department of Commerce, to Senator Thomas Sterling (Jan. 31, 1923) in Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. Of the Senate Comm. On the Judiciary, 67th Cong., 3d Sess. 14 (1923) (emphasis added).

It is more than interesting that the exact language of Hoover, who introduced the phrase "engaged in" and included "railroad employees," and not that of the ABA, was adopted. Hoover was an active supporter of the bill: he listed it in his Annual Report for 1925 as one of his Department's achievements, he pressed it before the public as a important commercial measure, and he stressed the Arbitration Act (and the cause of commercial arbitration) in his memoirs. *See* Ray L. Wilbur and Arthur M. Hyde, The Hoover Policies 114 (1937); Press release from the Department of Commerce, Secretary

Hoover Favors Arbitration (Dec. 28, 1925); and Herbert Hoover, The Memoirs of Herbert Hoover: The Cabinet and the Presidency 1920-1933, 68-69 (1952). Hoover intended for the exemption to cover all workers' contracts.

Mr. Furuseth, the president of the union himself in his analysis of H.R. 13522 (the bill that became the FAA) submitted to the Convention, reiterated that his concern was with workers' rights generally not just those of seamen:

> So much for the seamen. (Was it the Protective and Indemnity Insurance lawyers that drew this bill?) Hardly. There were others. The bill applies to all workers in interstate and foreign commerce and to others, that are not necessarily workers.

The analysis is *reprinted at* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Employment and Labor L. 300 Appendix (1996).

The broad focus of the exclusion has been eloquently reiterated by a number of commentators, most notably, Archibald Cox:

> At that time [when the Federal Arbitration Act was first adopted] no one supposed that there was federal power to regulate employment relations in industries producing goods for commerce or industries affecting commerce, and the phrase "any other class of workers engaged in interstate or foreign commerce" might well have been considered broad enough to reach every contract of employment subject to federal regulation.

See Archibald Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 598 (1954).

For further, in-depth discussion of the argument in this section of the petition, see Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Employment and Labor Law 282-302 (1996). *See also* Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internalization (1992).

3. The Second Circuit has entered a decision in this case in conflict with the decision of the Supreme Court in *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945 (1988). This Court in *Van Cauwenberghe* unambiguously defined a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

Section 16(a)(3) of the Federal Arbitration Act ("FAA") allows for appeals to be taken from "final decisions" in cases involving arbitration issues: "an appeal may be taken from a final decision with respect to an arbitration that is subject to the FAA." 9 U.S.C. section 16(a)(3). The section explicitly disallows appeals from interlocutory orders that stay judicial proceedings pending arbitration under 9 U.S.C. section 3, except to the extent allowed under 28 U.S.C. section 1292(b), and specifically allows appeals from orders refusing a stay of any action under 9 U.S.C. section 3.

In *Van Cauwenberghe v. Biard*, the Supreme Court has defined a "final decision" as one that "ends the litigation on the

merits and leaves nothing for the court to do but execute the judgment." 486 U.S. 517, 521, 108 S. Ct. 1945, 1949 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 s. Ct. 631, 633, 89 L. Ed. 911 (1945)) (emphasis added).

The Second Circuit's granting of Respondents' Motion to Dismiss for Lack of Jurisdiction was in conflict with *Van Cauwenberghe*—as the district court's order to stay all proceedings pending arbitration should have been treated as a final appealable decision. Because the district court has sent all issues to arbitration, there is nothing for the district court to do in this case but execute judgment within the meaning of *Van Cauwenberghe*.

Two terms have resurfaced as the courts have grappled to give meaning to Section 16 of the FAA (the section upon which the Respondents' motion was based): "embedded" and "independent." An "embedded" action is one in which, in addition to a request for a ruling on the issue of arbitrability, other relief—generally a ruling concerning the merits of the claims—is being sought from the court. *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). An "independent" action is one in which the only issue before the court is that of arbitrability. *Id.*

Originally, the courts, including the Second Circuit, as a general rule interpreted Section 16(a)(3) as allowing appeals from "independent" actions *per se*, but as not ever allowing appeals from "embedded" actions. This distinction between "independent" and "embedded" emerged from a strong, albeit misguided, belief that, in the latter case, the underlying merits of the claims for relief are not resolved until arbitration is completed and the judicial review is often necessary for this

award to become enforceable. In contrast, the reasoning went, where the only claim for relief is a petition for arbitration, the court has resolved the only issue before it once arbitration is granted.

The rationale for allowing appeals from independent actions, even those where the proceedings are stayed pending arbitration, is perhaps best stated in *North River Insurance Company v. Philadelphia Reinsurance Corporation*, 63 F.3d 160, 164 (quoting *University Life Insurance Company v. Unimarc Ltd.*, 699 F.2d 846, 850 (1983)):

> [Retaining jurisdiction to deal with any post-award proceedings] actually is little different from what it would be if the district judge had not retained jurisdiction. The difference in procedures is minor, technical, and unrelated to the purpose of the final-judgment rule; it should not affect appealability.

See also the discussion of independent actions in *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994); and *Gammaro v. Throp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994).

This same rationale supports appeals from judgments in cases where the proceedings are stayed pending arbitration of *all* claims. However, this rationale has not been applied in these cases, despite the fact that the legislative history of Section 16 would imply that it should be:

> If the judge had ordered arbitration, . . . it would still be open to the parties . . . to go back to him for interpretation or modification of an order

> . . .and . . . to bring a fresh proceeding in the court below, under 9 U.S.C. § 9, to enforce [any] award. Yet if the district court had not formally retained jurisdiction; neither possibility would have made the order to arbitrate nonappealable. . . . The difference in procedures is minor, technical, and unrelated to the purpose of the final-judgment rule; it should not affect appealability.

Committee on the Judiciary, Section by Section analysis on S1432 (in lieu of a Committee Report), 100th Cong., 2d Sess. 134 Cong. Rec. S16,284, S19,309 (1988) (emphasis added). Cases denying appeals where the district court has retained jurisdiction while sending all claims to arbitration include: *Perera v. Siegel Trading Co., Inc.*, 951, F.2d 780, 785 (7th Cir. 1991) and *Corion Corp. v. Chen*, 964 F2d 55 (1st Cir. 1992).

In Section 202.11[7] of Moore's Federal Practice 3rd Edition (MB) (1997), at page 202-58, recently retired Second Circuit Judge George C. Pratt viewed as artificial the distinction between "independent" cases and "embedded" cases where proceedings are stayed pending arbitration of all claims:

> [The distinction] is, in a sense, artificial in that an order compelling arbitration in an "embedded" action ends the federal litigation in most cases. Unless the action contains arbitrable and non-arbitrable claims, the substance of the action will be arbitrated, leaving nothing for the district court to do but either enter judgment on the arbitration award, or vacate the award.

Also there is no distinction in respect of "finality" between a dismissed case in which *all* claims are sent to arbitration and an

"open" case in which *all* judicial proceedings are stayed pending arbitration. In each situation, there is a final decision within the meaning of *Van Cauwenberghe*. Yet the Second Circuit has distinguished the two—allowing an appeal only when the district court dismisses the case. *See, e.g., Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60 (2d Cir. 1996). Though the Second Circuit did not directly address the issue of appealability in *Thomas James Assocs.*, the basis for the court's jurisdiction is an integral part of any appellant brief filed in a United States court of appeals. Fed. R. App. P. 28(a)(2), *Appellant's Brief*.

In *Filanto, S.P.A. v. Chilewich International Corp.*—one of the few recorded cases, in which the Second Circuit, since the enactment of Section 16(a)(3), has voiced its views on the treatment of embedded actions—the Second Circuit found that the action was not appealable, not simply under the tenets of Section 16 but because the stay granted by the district court was allowable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards:

> Because the District Court declined to dismiss the complaint, *see Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 826 (2d Cir. 1990) (district court may retain jurisdiction over action subject to Convention on the Recognition and Enforcement of Foreign Arbitral Awards) . . . , its order compelling arbitration is not appealable under 9 U.S.C. section 16(b)(3)[*sic*].

Id. at 61. The court noted that were an appeal to be allowed:

> [The relief] might be limited to vacating the dismissal, reinstating the complaint, and declining

> to review at that stage the order directing arbitration.

Id. at 61 n.3.

However, *Filanto* did not involve employment contracts, Title VII and/or other statutory claims. Unlike the case at hand, *Filanto* was a purely commercial arbitration action governed by the Convention. The courts have found and the Convention itself imposes a much lower standard for arbitrability of agreements that fall within the scope of the Convention. *See* Section 208 of the Convention (section 208 of the FAA, 9 U.S.C. § 208)) (Sections 1 through 16 of the FAA only apply to agreements governed by the Convention to the extent those provisions do not conflict with the Convention or with the U.S. rules for enforcement of the Convention at 9 U.S.C. § 201-208); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 631, 105 S. Ct. 3346, 3356 (1985) ("[E]mphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce."); *Progressive Cas. v. C.A. Reaseguradora Nacional*, 802 F.Supp. 1069 (S.D.N.Y. 1992), *rev'd and remanded*, 991 F.2d 42 (2d Cir. 1993) (holding that federal policy "strongly" favors arbitration of agreements governed by the Convention). The rules of the Convention are found at the Historical and Statutory Notes following 9 U.S.C.A § 201 (Supp. 1997)).

More recently, the courts have begun to move away from a wholesale finding that orders in embedded actions are never appealable and have either allowed appeals (or indicated that they would allow an appeal) where there is what the court has determined to be a "final" judgment in an embedded action.

See, e.g., Corion Corp. v. Chen, 964 F.2d 55 (1st Cir. 1992) (appeal dismissed because district court had not purported to enter a final judgment); *American Cas. Co. of Reading, Pa. v. L-J, Inc.*, 35 F.3d 133, 139 (4th Cir. 1994) (dismissal was "particularly appropriate" since order was not final); *Arnold v. Arnold, Corp.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990) (order was final and appealable); *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1254 (7th Cir. 1993) (same); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995) (order from a final judgment was immediately appealable); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 360 (11th Cir. 1989) (order closing case for statistical purposes did not render the action final and appealable).

However, the courts have yet to follow *Van Cauwenberghe* in respect of actions where judicial proceedings are stayed while all claims are sent to arbitration. These actions continue to be treated as non-appealable.

CONCLUSION

The Petitioner requests that the Court find her claims are not subject to the FAA and thus are not arbitrable; and that, in the alternative, the District Court's order was a "final decision" within the meaning of Section 16 of the Federal Arbitration Act and was immediately appealable to the Second Circuit.

Respectfully submitted,

Nellie Howard,
For Herself

September 2, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nellie Howard, Appellant,

-against-

Kathy Anderson, KPMG Peat Marwick,
and KPMG Peat Marwick LLP, Appellees.

ORDER

Docket Number 97-7044
June 3, 1996

BEFORE: Meskill, Jacobs, and Leval , Circuit Judges

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 3rd day of June, one thousand nine hundred and ninety-seven.

It is hereby ordered that appellee Kathy Anderson et. al.s' motion to dismiss the appeal herein be and it hereby is GRAND.

It is further ordered that appellees' motion for sanctions is DENIED.

It is further ordered that appellant's motion to construe the appeal as petition for a writ of mandamus be and it hereby is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NELLIE HOWARD,
Plaintiff,

-against-

KATHY ANDERSON, KPMG PEAT MARWICK,
and KPMG PEAT MARWICK LLP,
Defendants.

Docket Number 96 Civ. 919 (SWK)
October 16, 1996

BEFORE: SHIRLEY WOHL KRAM, District Judge

In this case asserting employment discrimination on the basis of gender and race, defendants KPMG Peat Marwick ("Peat Marwick"), KPMG Peat Marwick LLP ("Peat Marwick LLP") (collectively "KPMG") and Kathy Anderson ("Anderson") move to stay this action pending arbitration of plaintiff Nellie Howard's ("Howard") claims. For the reasons set forth below, defendants' motion is granted.

BACKGROUND

On March 3, 1993, Howard met with Anderson, a partner in KPMG's New York office, and other KPMG employees to discuss the possibility of employment. During the next few months, KPMG employees from other offices also contacted Howard about a potential career at KPMG. On June 23, 1993, Howard met with Anderson for a second time in Washington, D.C., where Howard was introduced to other KPMG employees. At this meeting, Howard claims that Anderson offered her a position with KPMG's New York office.

On July 9, 1993, Howard met with Anderson yet again, this time in the New York office. During this visit, various KPMG representatives described some of the benefits of KPMG employment. Before her departure, Howard claims that she declined Anderson's offer of employment. According to Howard, at no time during any conversation with any KPMG representative was she informed of the "Senior Manager's Agreement" or any arbitration obligation.

After a number of oral communications between Howard and Anderson regarding possible employment, Peat Marwick faxed Howard a letter dated August 6, 1996 (the "Offer Letter"), in which Peat Marwick offered Howard a position as a senior tax manager. The Offer Letter described, inter alia, Howard's compensation, benefits, job title, relocation package and company policies. Howard claims that in reliance on the Offer Letter, she left her previous job and agreed to commence employment with Peat Marwick.

Howard alleges that on September 20, 1993, she commenced employment with Peat Marwick in New York. On or about November 4, 1993, Howard received a Senior

Manager's Agreement dated September 20, 1993 (the "Agreement"), which, like the Offer Letter, described the terms of her employment. The Agreement also contained, however, other clauses not mentioned in the Offer Letter, including, inter alia: (1) A restrictive covenant provision; (2) an employment at will provision; (3) a confidentiality provision; (4) a provision for partial salary payment following termination of employment; (5) a provision terminating Howard's rights against Peat Marwick at the conclusion of her employment; and (6) an arbitration provision.

The arbitration clause provides:

> Any claim or controversy between the parties arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions of the employment of Senior ,~anager by Peat Marwick, shall be settled by arbitration under the rules of the American Arbitration Association and the laws of the State of New York.

Agreement, annexed to the Affidavit of John Hutchinson, sworn to on April 23, 1996 (the "Hutchinson Aff."), as Exh. "2," at ¶ 11. In January or early February 1994, after having reviewed the terms of the Agreement, }Ioward discussed it with Anderson. Sometime in early February 1994, Howard signed and returned the Agreement to Peat Marwick.

In August 1994, Peat Marwick became a limited liability partnership, and amended its Articles of Partnership to suffix "LLP" to its name. The partnership was not dissolved and continued without interruption with the same partners, principals, employees, assets, rights, obligations, liabilities and

operations as maintained prior to the change. Specifically, Howard continued her employment pursuant to the terms and conditions of the Agreement, and her duties, responsibilities and salary remained constant. According to defendants, Peat Marwick LLP is in all respects the successor in interest to Peat Marwick.

On or about October 25, 1994, Howard's employment with KPMG was terminated. According to Howard, KPMG's Chicago office subsequently offered her an employment position. Howard claims that this offer was withdrawn, however, after representatives of KPMG's Chicago office spoke with defendant Anderson.

On or about February 7, 1996, Howard filed this lawsuit alleging gender and race discrimination, intentional and negligent infliction of emotional distress, negligent supervision, fraud and misrepresentation. On April 23, 1996, defendants brought the present motion to stay judicial proceedings pending arbitration. Pursuant to the Court's instructions at a case conference on April 10, 1996, defendants have not answered or otherwise responded to the Complaint and no discovery has been conducted.1

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1 The Court does not address Howard's motion for summary judgment. Howard has neither followed this Court's rules prior to filing a motion nor noticed a motion for summary judgment. In addition, defendants have not filed an answer pursuant to the Court's instructions, and thus Howard's assertion that defendants have failed to deny any of her accusations is without basis.

DISCUSSION

I. The Federal Arbitration Act

Section 2 of the Federal Arbitration Act ("FAA") provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. The scope of the "involving commerce" requirement extends to the limits of Congress's Commerce Clause power. Allied-Bruce Terminix Cos. v. Dobson, __ U.S. __, 115 S. Ct. 834, 841 (1995). KPMG, a nationwide accounting firm with over 130 offices located throughout the country, is involved in commerce within the meaning of section 2 of the FAA. See Maye v. Smith Barney, Inc., 897 F. Supp. 100, 105 (S.D.N.Y. 1995) (FAA applicable because company used instrumentalities of interstate commerce, such as mail, telephones and electronic telecommunications systems). Specifically, the Agreement between Howard and KPMG stipulated that Howard would perform "any and all work assigned by the Firm at such time and in such places as may be designated . . . ." Agreement, annexed to the Hutchinson Aff. as Exh. "2," at ¶ 4. Pursuant to this term in the Agreement, Howard's responsibilities at KPMG included interstitial transactions. For example, Howard travelled to various business conferences in South Carolina and California and worked with other KPMG employees from around the country.2 Affidavit of

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2 Howard's argument that the alleged acts of wrongdoing occurred only in New York is irrelevant. The determination of whether the Aqreement falls within the ambit of the FAA

Nellie Howard, sworn to on May 20, 1996 ("Howard Aff."), at ¶¶ 23, 26-27. Therefore, the Agreement evidences a transaction involving commerce within the meaning of section 2 of the FAA.

Having concluded that the Agreement falls within the scope of the FAA, the Court must determine whether a stay of judicial proceedings is warranted pending the arbitration of Howard's claims. Section 3 of the FAA provides:

> If any suit or proceeding brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . .

9 U.S.C. § 3. In deciding whether to stay juaicial proceedings pending arbitration, the Court considers (1) whether the parties agreed to arbitrate; (2) whether the dispute falls within the scope of the agreement to arbitrate; (3) whether Congress intended the federal statutory claims to be arbitrable; and (4) if only some of the claims are subject to arbitration, whether the Court should stay the remainder of the proceedings pending arbitration. Maye v. Smith Barney, Inc., 897 F. Supp. at 105-106. The above test leaves no room for judicial discretion.

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requires analysis of the scope and content of the Agreement, not the alleged wrongful conduct. 9 U.S.C. §§ 2, 3; see Maye v. Smith Barney, Inc., 897 F. Supp. at 105-106.

If the issues raised in the judicial proceeding are the subject of an arbitration agreement, the proceedings must be stayed pending arbitration. Dean Witter Reynolds. Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238 (1985). Thus, unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the Court must enforce the arbitration clause. AT&T Technologies. Inc. v. Communications Workers of America, 475 U.S. 643, 650, 106 S. Ct. 1415 (1986) (quoting United States Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

II. The Agreement to Arbitrate

It is undisputed that Howard signed the Agreement which contains the arbitration clause. Howard claims, however, that she is not bound by the arbitration clause because (1) she received no consideration for her promise to arbitrate; and (2) her allegation that she was fraudulently induced to sign the Agreement is an issue that must be resolved by the Court. In the alternative, Howard asserts that the arbitration clause does not cover all her claims against all the defendants.

A. Consideration for the Agreement and Arbitration Clause

Howard contends that the Agreement, and thus the arbitration clause, are unenforceable for lack of consideration. Specifically, Howard asserts that although the Agreement imposed additional burdens on her not included in the Offer Letter, she received no new consideration to which she was not already entitled under the terms of the Offer Letter. This allegation is, on its face, without merit. The Agreement, unlike

the Offer Letter, provides for compensation payable to Howard in the event of termination. Paragraph Six of the Agreement provides, "[s]hould Peat Marwick give such notice for any reason other than good cause, it shall pay Senior Manager one-sixth (1/6) of the annual salary Senior Manager was receiving at the date notice of termination was given . . . ." Agreement, annexed to the Hutchinson Aff. as Exh. "2," at ¶ 6(a). Thus, after Howard's termination on or about October 25, 1994, she was paid one-sixth of her annual salary through December 31, 1994, pursuant to the terms and conditions of the Agreement. KPMG was not required to make this payment pursuant to the Offer Letter or to any other agreement entered into with Howard. Therefore, Howard's promise to arbitrate pursuant to the Agreement is supported by adequate consideration.

In addition, it is well-settled that a reciprocal promise by both parties to arbitrate is, without more, sufficient consideration. Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 758 (2d Cir. 1967). Howard claims, however, that KPMG's obligation to arbitrate is illusory because Paragraph Six of the Agreement provides that "all other benefits and rights incident to employment shall immediately and completely cease as of such termination date, and Senior Manager shall have no other claims or rights against the Firm . . . ." Agreement, annexed to the Hutchinson Aff. as Exh. "2," at ¶ 6(b). Thus, according to Howard, because her right to compel KPMG to arbitrate ceased upon termination of her employment, whereas KPMG's right to compel arbitration is without limitation, the arbitration agreement lacks mutuality. Howard's interpretation of Paragraph Six is unpersuasive. Paragraph Six does not

prevent Howard from compelling arbitration of any contractual or statutory claim against KPMG. Rather, reading the Agreement as a whole, it is clear that this clause terminates KPMG's contractual obligations to provide Howard with compensation or other benefits after termination, except as otherwise provided for in the Agreement.3

Similarly, Howard alleges that Paragraph Eight renders KPMG's obligation to arbitrate illusory because this clause purportedly grants KPMG a unilateral option to obtain an injunction in a judicial forum.4 Although Paragraph Eight is silent on the issue of judicial forums or injunctions, Howard infers such remedies from the language of the clause.5 Thus, according to Howard, because the Agreement grants KPMG the unilateral option to enforce restrictive covenants in a judicial forum, the arbitration clause lacks mutuality and should not be

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3 KPMG does not and cannot claim that Paragraph Six of the Agreement constitutes a waiver of Howard's substantive statutory rights or contractual rights provided for in the event of termination.

4 Paragraph Eight refers to certain non-competition and non-solicitation obligations, which are not the subject of this action.

5 The language of Paragraph Eight — "reasonable as to time and area, necessary to protect the legitimate interests" — mirrors the requirements for an injunction under New York law. See Gelder Medical Group v. Webber, 41 N.Y.2d 680, 683, 394 N.Y.S.2d 867, 870, 363 N.E.2d 573, 576 (1977). Therefore, Paragraph Eight does not extend KPMG's rights in any way.

enforced.

First, although Paragraph Eight incorporates the necessary elements for injunctive relief, it makes no mention of a right to judicial remedies. Second, even if this clause does allow KPMG to seek an injunction, this Circuit has consistently upheld the validity of contractual provisions that provide for preliminary injunctive relief pending arbitration. See, e.g., Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp., 705 F.2d 31, 35 (2d Cir. 1983); Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F.2d 468, 471-73 (2d Cir. 1980). Moreover, clauses that provide for injunctive relief pending arbitration do not destroy mutuality of consideration underlying the arbitration clause. See Erving v. Viginia Squires Basketball Club, 468 F.2d 1064, 1066-67 n.1 (2d Cir. 1972). Finally, absent a contractual provision permitting injunctive relief pending arbitration, a court may grant such injunctive relief when appropriate. See Blumenthal v. Merrill Lynch. Pierce. Fenner & Smith. Inc., 910 F.2d 1049, 1052 (2d Cir. 1990). For these reasons, Howard's allegation that Paragraph Eight renders the Agreement void due to a lack of mutuality is without merit.

B. Fraudulent Inducement

Howard argues that even if her proinise to arbitrate was supported by consideration, she is nonetheless entitled to a judicial determination as to whether she was fraudulently induced to agree to arbitration. Contrary to her assertions, Howard does not properly allege fraudulent inducement as to the arbitration clause, or as to the entire Agreement. Rather, the Complaint alleges that Howard was fraudulently induced into her employment with KPMG based on the Offer Letter. For

example, Howard asserts that KPMG led her to believe that the Offer Letter - which omitted various terms that were contained in the Agreement, including the arbitration clause - fully and accurately described the conditions of her employment. In addition, Howard claims that had she known about the arbitration clause, she would not have accepted employment with KPMG. Significantly, Howard does not claim that she was unaware of the arbitration clause when she signed the Agreement. Rather, Howard reviewed the Agreement, including the arbitration clause, discussed the Agreement with Anderson, signed it, and returned it to the KPMG Personnel Office. Howard Aff. at ¶¶ 29-31, 38-40. Thus, to the extent Howard was misled, it was not by the terms of the Agreement. Therefore, Howard does not, as a matter of law, allege a claim of fraudulent inducement with respect to either the arbitration clause in particular or the Agreement in general. Smith Barney Shearson. Inc. v. DeFries, No. 94 Civ. 20, 1994 WL 455178, at *2 (S.D.N.Y. Aug. 19, 1994) (plaintiff's claim of fraud in the inducement of an arbitration clause must establish that defendant misrepresented the clause or prevented or dissuaded plaintiff from becoming aware of it).

In any event, even if the Court were to find that Howard alleged fraudulent inducement as to the agreement, arbitration would still be mandated because her allegations are not directed to the arbitration clause per se, but to the Agreement in general. Howard asserts that the Agreement contained numerous clauses not included in the Offer Letter that purportedly render the Agreement void. Because it is well-established that claims relating to the making of the entire contract are matters for arbitrators rather than the courts, Howard's fraudulent

inducement claim does not, in any scenario, warrant judicial determination before arbitration. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403404, 87 S. Ct. 1801 (1967); Conticommoditv Services v. Philipp & Lion, 613 F.2d 1222, 1225 (2d Cir. 1980).

III. Claims Within the Scope of Arbitration

Howard asserts in the alternative that the arbitration clause does not cover all the claims against all the defendants. First, Howard contends that her claims of fraud against Anderson and Peat Marwick are not subject to arbitration because the alleged acts of fraud occurred prior to Howard's employment with Peat Marwick and thus prior to the execution of the Agreement. In support of this assertion, Howard relies on Paragraph Two of the Agreement, which provides that the terms of the Agreement "shall begin" on September 20, 1993. Agreement, annexed to the Hutchinson Aff. as Exh. "2," at ¶ 2. This formalistic argument is unpersuasive. The arbitration clause in the Agreement, by its terms, applies to any controversy "in any way related to the terms and conditions of the employment . . . ." Id. at ¶ 11. Thus, the actual dates of the events giving rise to Howard's claims are of little significance. Of primary importance is the fact that Howard's claims arise directly from her employment with KPMG.

Second, Howard claims that her post-employment claims against Peat Marwick LLP are not subject to arbitration. The arbitration clause requires the parties to submit any claim to arbitration that is "in any way related to the terms and conditions of the employment . . . ." Id. According to Howard, Peat Marwick LLP's failure to rehire her in the Chicago office

after her termination from the New York office was an independent act unrelated to her previous employment. Thus, Howard contends that this claim is outside the scope of the arbitration clause. However, this assertion directly contradicts Howard's allegation that the revocation of her Chicago office offer was a result of information provided by Anderson from the New York office. According to Howard, the Chicago office's decision not to hire her was directly related to Anderson's evaluation of her performance while employed by KPMG in New York, pursuant to the Agreement. In addition, the arbitration clause at issue governs any claims related to Howard's employment with KPMG, regardless of when they originated. Id.; see also Monroe Sander Corp. v. Livingston, 377 F.2d 6, 10 (2d Cir.), cert. denied, 389 U.S. 831 (1967) (whether dispute and demand for arbitration occurred after expiration of agreement to arbitrate is irrelevant given broad language of arbitration clause).

Third, Howard contends that since the Agreement was between Peat Marwick and herself, her claims against Peat Marwick LLP are not subject to arbitration. This argument lacks both factual and legal support. First, Howard does not deny that Peat Marwick LLP retained the same partners, principals, employees, assets, rights, obligations and liabilities as Peat Marwick. Thus, Peat Marwick LLP is, in every sense, a successor in interest to Peat Marwick. See Hendler & Murray, P.C. v. Lambert, 114 A.D.2d 1003, 1005, 495 N.Y.S.2d 443, 445 (2d Dep't 1985). Second, Howard acknowledges that a successor entity may invoke an arbitration agreement entered into by its predecessor. Banque de Paris et des Pays-gas v. Amoco Oil Co., 513 F. Supp. 1464, 1466 (S.D.N.Y. 1983)

(assignee bound by assignor's agreement to arbitrate absent notice to the contrary). Howard's argument that Peat Marwick LLP cannot invoke the arbitration clause is based solely on the fact that under the new company structure, the potential liability of KPMG's partners may, in certain instances, be reduced. This fact has no relevance to the arbitration issue presented in this case. See Hendler & Murray P.C. v. Lambert, 67 N.Y.2d 831, 833, 501 N.Y.S.2d 645, 492 N.E.2d 773 (1986) (conversion of former law partnership into professional corporation does not affect issue of arbitrability since successor succeeded to rights and obligations of former partnership); Lippus v. Dahlgren Mfg. Co., 644 F. Supp. 1473, 1482 (E.D.N.Y. 1986) (successor in interest to party to agreement may enforce arbitration clause).

Finally, Howard asserts that Anderson may not enforce the arbitration clause because she was not a party to the Agreement. Howard claims that as a partner, Anderson is not an "employee" of KPMG, but rather is akin to an "owner," and thus outside the scope of the arbitration clause. This argument is without merit. Howard concedes that acts of employees of a party to an arbitration agreement are subject to arbitration to the same extent as acts by the principals, so long as the acts are within the scope of the agreement. Gateson v. ASLK-Bank, N.V./CGER-Banque S.A., 1995 WL 387720, at *5. Howard asserts, however, that her claims against Anderson are not subject to arbitration because Anderson is a partner, rather than an employee. Howard fails to recognize that as a partner, Anderson is, in effect, a principal of KPMG, and thus a direct party to the Agreement. See Creative Sec. Corp. v. Bear Stearns & Co., 671 F. Supp. 961, 968 n.11 (S.D.N.Y. 1987) (claims against partners subject to arbitration even thought [*sic*]

partners were neither named parties nor signatories to the arbitration agreement); Brener v. Becker Paribas Inc., 628 F. Supp. 442, 451 (S.D.N.Y. 1985) (claims against officers of brokerage firm subject to arbitration even though the firm, not the officers, signed the arbitration agreement). In addition, a party need not have actually signed an agreement to be bound by it so long as the arbitration clause is in writing. Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960). Rather, the scope of the arbitration clause is interpreted according to the parties' intentions and the context in which the contract was made. S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc., 576 F. Supp. 566 570 (S.D.N.Y. 1983). The Court finds that it would be unreasonable to interpret the arbitration clause between KPMG and Howard as excluding claims against KPMG partners from its scope. This interpretation is particularly unwarranted given the strong federal policy favoring arbitration: "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or [another] allegation . . . ." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927 (1983).**6**

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6 The Court need not address the issue of whether Congress intended the federal statutory claims presented here to be arbitrable. Plaintiff does not dispute the well-established principle that Title VII claims are arbitrable under the FAA. Gateson v. ASLK-Bank. N.V./CGER-Banque S.A., No. 94 Civ. 5849, 1995 WL 387720 (S.D.N.Y. June 29, 1995); Hall v. MetLife Resources, No. 94 Civ. 348, 1995 WL 258061, at *2-*3 (S.D.N.Y. May 3, 1995).

IV. Jury Trial

Howard seeks a jury trial as to the making of the Agreement requiring arbitration, pursuant to section 4 of the FAA. Section 4 permits a trial where there exits a dispute over "the making of the agreement for arbitration." 9 U.S.C. § 4. Although defendants' motion is brought pursuant to section 3 of the FAA, plaintiff may still demand a jury trial to resolve issues regarding the formation of the contract pursuant to section 4. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, 87 S. Ct. 1801 (1987); PMC Inc. v. Atomergic Chemetals, 844 F. Supp. 177, 180 n.2 (S.D.N.Y. 1994). Here, however, there is no genuine issue as to the existence and validity of the arbitration agreement. Although Howard presently seeks to avoid its consequences, she concedes that she signed the Agreement with full knowledge of all its terms, including the arbitration clause. Howard's conclusory statement that she is not required to arbitrate her claims does not create a genuine issue regarding the validity of the arbitration clause. Therefore, because Howard has not raised a genuine issue as to the existence of the arbitration clause or the Agreement, she is not entitled to a jury trial under section 4 of the FAA.

V. Waiver and Laches

Howard claims that because defendants did not notify her of their desire to arbitrate until after she filed the instant action, approximately one and a half years after her termination from KPMG, they are presently barred from seeking arbitration. In

essence, Howard asserts that defendants' failure to utilize arbitration before her employment was terminated resulted in a waiver of the right to arbitrate. Even accepting all of Howard's allegations, there was no "dispute" to be arbitrated until Howard initiated this action. Until that point, there was only a termination of employment. In addition, Howard's proposition that arbitration pursuant to an employment contract is waived unless it is sought prior to termination is without support. In any event, when an arbitration clause exists, issues of waiver and delay are to be addressed by arbitrators, not courts. Consolidated Rail Corp. v. Metropolitan Transp. Auth., No. 95 Civ. 2142, 1996 WL 137587, at *13 (S.D.N.Y. March 22, 1996). Therefore, defendants have not waived their right to arbitration under the Agreement.7

CONCLUSION

For the reasons set forth above, defendants' motion to stay proceedings pending arbitration, pursuant to the FAA, is granted.

SO ORDERED.

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7 In addition, Howard's claim that she is entitled to discovery is without merit. As previously noted, Howard has not alleged fraudulent inducement as to the arbitration clause or the Agreement, since she admits having read and understood the Agreement. Similarly, Howard's claim of arbitrator bias lacks factual support and is premature. Alter v. Englander, 901 F. Supp. 151, 153 (S.D.N.Y. 1995) (challenges to arbitration based on arbitrator bias are properly brought after an award has been issued).

APPENDIX C
STATUTES

I. Federal Arbitration Act

A. Section 1 of the FAA (9 U.S.C. § 1), "*Maritime transactions" and "commerce" defined; exceptions to operation of title,* in pertinent part, provides as follows:

`[C]ommerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

B. Section 2 of the FAA (9 U.S.C. § 2), *Validity, irrevocability, and enforcement of agreements to arbitrate*, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

C. Section 16 of the FAA (9 U.S.C. § 16), *Appeals*, provides as follows:

(a) An appeal may be taken from--

(1) an order-

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to compel arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of any award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to his title.

(b) Except as otherwise provided in section 1292(h) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

II. Civil Rights Act of 1991

Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081, *Alternative Means of Dispute Resolution*, provides that:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement, negotiations, conciliation, faciliation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provision of Federal law amended by this title.

APPENDIX D

Affidavit of Larry Jansen, Director of Tax Professional Recruiting at KPMG's New York Office, on KPMG's procedure for presenting KPMG's Senior Manager's Agreement Containing the Arbitration Clause to New Employees

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nellie Howard, Plaintiff,

-against-

Kathy Anderson, KPMG Peat Marwick,
and KPMG Peat Marwick LLP, Defendants.

AFFIDAVIT OF LARRY JANSEN
Docket Number 96 Civ. 919
Filed June 1996

State of New York)
ss.:)
County of New York)

Larry Jansen, being duly sworn, hereby deposes and says:

1. I am the Director of Tax Professional Recruiting in Peat Marwick LLP's New York office. I make this affidavit in further support of Peat Marwick's motion to stay all proceedings in this action pending the arbitration of plaintiff's claims.

2. The August 6, 1993 offer letter on which plaintiff relies was the standard offer letter issued to all tax professionals in Peat Marwick's New York offices in 1993. The letter describes the position offered to the professional, the amount of compensation and some of the terms and conditions of employment. The offer letter was not intended to be an exhaustive description of each of the terms and conditions of plaintiff's employment.

3. In 1993 and thereafter, all tax professionals in Peat Marwick's New York office were given additional agreements, affidavits and statements to sign after the commencement of their employment with Peat Marwick. These documents included: (i) an Agreement Regarding Confidential Information and Intellectual Property Rights; (ii) an Employment Affidavit; and (iii) a Drug-Free Workplace Statement.

4. In 1993, all Senior Managers such as plaintiff were given a Senior Manager's Agreement to execute after the commencement of their employment with Peat Marwick, and after the circulation to them of an offer letter prior to the commencement of their employment. That remains the case today.

5. The manner in which the offer letter, Senior Manager's Agreement, and all other agreements were circulated to plaintiff was characteristic of how these documents were circulated to all other tax professionals in Peat Marwick's New York office in 1993.

Signed,
LARRY JANSEN

Dated, June 3, 1996

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

No. 97-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NELLIE HOWARD,

Petitioner,

v.

KATHY ANDERSON, KPMG PEAT MARWICK, and KPMG PEAT MARWICK LLP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly held that a district court's order staying its own proceedings pending arbitration of the claims underlying the action, pursuant to 9 U.S.C. § 3, but not dismissing that action, is an interlocutory order not subject to immediate appeal.

RULE 29.6 DISCLOSURE

Respondent KPMG Peat Marwick LLP has no parent or subsidiary companies.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kathy Anderson, KPMG Peat Marwick and KPMG Peat Marwick LLP (collectively "KPMG") respectfully request that this Court deny the petition for writ of certiorari filed by Petitioner Nellie Howard seeking review of the June 3, 1997 order of the United States Court of Appeals for the Second Circuit.

ORDERS BELOW

The unreported summary order of the court of appeals is set forth on page 1A of the petition for writ of certiorari. The district court's unreported decision is set forth on page 2A of the petition for writ of certiorari.

JURISDICTION

The order of the court of appeals was entered on June 3, 1997. The petition for writ of certiorari was filed on September 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was hired by KPMG as a senior tax manager in KPMG's New York City office and commenced employment on September 20, 1993. (Pet. App. 3A.) Shortly thereafter, petitioner signed a Senior Manager's Agreement containing a clause providing for arbitration of "[a]ny claim or controversy between the parties arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions" of petitioner's employment. (*Id.* at 3A-4A.) On or around October 25, 1994, petitioner's employment with KPMG was terminated. (*Id.* at 5A.)

Petitioner filed a complaint in the United States District Court for the Southern District of New York, alleging several causes of action, all of which concerned her employment with KPMG and its termination. (*Id.*) KPMG moved to stay the action pending the arbitration of petitioner's claims pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). (*Id.*) The district court granted KPMG's motion to stay the action pending arbitration of petitioner's claims (the "stay order"). (*Id.* at 18A.)

Petitioner noticed an appeal from the stay order to the United States Court of Appeals for the Second Circuit. The court of appeals, without oral argument, issued an unreported summary order granting KPMG's motion to dismiss the appeal for lack of jurisdiction, denying KPMG's motion for sanctions, and denying petitioner's motion to construe her appeal as a mandamus petition. (Pet. App. 1A.)

ARGUMENT

I. ALMOST ALL OF PETITIONER'S ARGUMENTS CONCERN ISSUES IRRELEVANT TO THE PETITION AND NOT PROPERLY BEFORE THE COURT

Contrary to petitioner's assertion, which consumes virtually all of her petition (Pet. 4-23), her interlocutory petition does not implicate the issue of "the applicability of the FAA to arbitration clauses in employment contracts" (Pet. 11) or, more specifically, the arbitrability of the claims she asserted in the district court. Petitioner asks this Court to review the Second Circuit's order (i) granting respondents' motion to dismiss for lack of jurisdiction petitioner's appeal from the district court's interlocutory stay order, and (ii) denying petitioner's motion to construe her appeal as a mandamus petition. As is clear from the face of this order, the Second Circuit did not affirm, or otherwise treat, the merits of the stay order. *See, e.g., Norte & Co. v. Defiance Indus., Inc.*, 319 F.2d 336, 337 (2d Cir. 1963) ("Since we dismiss this appeal for lack of jurisdiction and find that . . . there is no reason to issue a writ of mandamus, we have no occasion to review on the merits [the district court's] ruling."). Nor does the court of appeals' order preclude timely appellate review of the stay order after the arbitration proceeding concludes and a final judgment is entered. *See Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). In this posture, the underlying question of the arbitrability of petitioner's claims is not at this juncture properly before this Court.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT CORRECTLY APPLIED SETTLED LAW IN AN INTERLOCUTORY ORDER THAT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The only issue properly presented in the petition is whether a federal court of appeals has appellate jurisdiction to review a district court's stay of its own proceedings pending the

arbitration of the claims underlying the action.[1] All courts considering this issue have properly held that stays pursuant to § 3 of the FAA,[2] are interlocutory and non-appealable. Accordingly, petitioner's challenge to the Second Circuit's dismissal of her appeal is meritless.

Petitioner's principal argument is that *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), compels classifying an order staying federal proceedings pending arbitration of all the underlying claims as a "final decision" subject to immediate appeal. Significantly, petitioner concedes that no court has accepted her argument regarding *Van Cauwenberghe*. (Pet. 29) ("actions where judicial proceedings are stayed while all claims are sent to arbitration . . . continue to be treated as non-appealable"). This is not surprising because petitioner's argument not only misreads *Van Cauwenberghe,* but also ignores the FAA provision governing the appealability of stays pending arbitration, 9 U.S.C. § 16, and precedent construing that provision.

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[1] Petitioner does not expressly include in her statement of the questions presented the Second Circuit's denial of her motion to construe her appeal as a mandamus petition, nor is this issue fairly included in the questions presented. Thus, this issue is not properly before the Court. See *Sup. Ct. Rule 14.1(a)*; *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1993).

[2] Section 3 of the FAA, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved is such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

Section 16 of the FAA, which governs appeals from arbitrability determinations, provides, in relevant part:

> (a) An appeal may be taken from --
>
> (1) an order --
>
> (A) refusing a stay of any action under section 3 of [the FAA],
>
> . . .
>
> (3) a *final* decision with respect to an arbitration that is subject to [the FAA].
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an *interlocutory* order --
>
> (1) granting a stay of any action under section 3 of [the FAA]; . . .

9 U.S.C. § 16 (emphasis added). Section 16(b)(1) clearly prohibits appeals as of right from interlocutory orders granting a stay of a pending action pursuant to § 3 of the FAA -- such as the district court's stay order in this action.[3]

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[3] Petitioner asserts that the legislative history of § 16 supports her interpretation of that provision. (Pet. 25-26.) But the legislative history she cites does not include the language that she attributes to it. Rather, the legislative history supports the Second Circuit's dismissal of petitioner's appeal:

> Subsection (a) of the proposal, in effect, permits an appeal where the effect of the court order favors litigation over arbitration . . . or where a final decision with respect to arbitration is involved. Subsection (b), on the other hand, would not permit an appeal in specified instances in which an interlocutory judicial order favored arbitration over litigation -- *e.g.*, granting a stay of the judicial action, compelling arbitration, or refusing to enjoin an arbitration.

134 Cong. Rec. 31,065 (1988).

Pursuant to § 16 of the FAA, whether an order granting a stay of an action pending arbitration is immediately appealable turns on whether the order is interlocutory or final. In making that determination, the Second Circuit distinguishes between orders issued in "independent" as opposed to "embedded" proceedings. *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 163 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1289 (1996); *Filanto*, 984 F.2d at 60. If the proceeding is "independent" -- *i.e.*, the plaintiff seeks no relief from the court other than an order compelling or prohibiting arbitration -- then an order compelling arbitration, whether styled a dismissal or a stay, is considered final and is immediately appealable. *North River Ins.*, 63 F.3d at 163; *Filanto*, 984 F.2d at 60. However, if the proceeding is "embedded" -- *e.g.*, a defendant in a pending lawsuit requests that the court compel arbitration of some or all of the claims against it -- then an order compelling arbitration is considered interlocutory and is not immediately appealable, absent certification for interlocutory review pursuant to 28 U.S.C. § 1292(b). *North River Ins.*, 63 F.3d at 163; *Filanto*, 984 F.2d at 60.[4] Other courts of appeals likewise distinguish between "independent" actions and "embedded" actions, and exercise appellate jurisdiction only over appeals from dismissals or stays in independent actions.[5]

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[4] Contrary to petitioner's suggestion (Pet. 26-27), *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60 (2d Cir. 1996), is not inconsistent with the Second Circuit's order in this action. As petitioner concedes, the issue of appellate jurisdiction was not raised by either party or decided by the Second Circuit in *Thomas James*. (Pet. 27.) Further, in *Thomas James* -- unlike here -- the order appealed from was a dismissal of the complaint in its entirety, not a stay of the action pending arbitration.

[5] *See McCarthy v. Providential Corp.*, 94 Civ. 16384, 1997 WL 471876, at *2-4 (9th Cir. Aug. 20, 1997); *F.C. Schaffer & Assocs. Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 41-43 (5th Cir. 1996); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1301-02 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995); *American Cas. Co. v. L-J, Inc.*, 35 F.3d 133, 135-39 (4th Cir. 1994); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *S+L+H S.P.A. v. Miller-St. Nazianz, Inc.*, 988

(Footnote continued)

The Sixth Circuit has not followed this approach of distinguishing between independent and embedded actions. However the result in this action would be the same under the Sixth Circuit's approach. The Sixth Circuit has held that even in an embedded action, an order dismissing -- rather than merely staying -- the action pending arbitration is final and immediately appealable. *See Arnold v. Arnold Corp. -- Printed Communications for Business*, 920 F.2d 1269, 1274-76 (6th Cir. 1990). Under either the majority approach -- which distinguishes between independent and embedded actions -- or the Sixth Circuit's approach -- which distinguishes between stay orders and dismissal orders -- the result is the same in cases like this one where the order stays an action in an embedded proceeding: the order is not subject to immediate appeal. Petitioner does not dispute that this is an embedded action, or that the district court merely stayed, rather than dismissed, her action. Thus, petitioner would have fared no better in the Sixth Circuit, and the disparity of approaches between the Sixth Circuit and the other courts of appeals makes no difference on these facts.

Petitioner places great weight on the *Van Cauwenberghe* definition of "final" to support her claim that the stay order in this action is final. But an order staying an action pending arbitration in an embedded proceeding does not fall within this definition of a "final decision": one that "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe*, 486 U.S. at 521-22. The stay of an embedded proceeding pending arbitration does not

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F.2d 1518, 1522 (7th Cir. 1993); *Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313, 316-19 (4th Cir. 1993); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 747-48 (5th Cir.), *cert. denied*, 508 U.S. 951 (1993); *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784-86 (7th Cir. 1992); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 729-32 (4th Cir. 1991); *In re Arbitration Between Chung and President Enters. Corp.*, 943 F.2d 225, 227-29 (2d Cir. 1991); *Delta Computer Corp. v. Samsung Semiconductor & Telecomm. Co.*, 879 F.2d 662, 664-65 (9th Cir. 1989); *Thomson McKinnon Sec. Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989).

terminate the proceedings in the district court. *See, e.g., American Cas. Co.*, 35 F.3d at 136-39 (stay order in an embedded action does not fall within the definition of "final decision" cited in *Van Cauwenberghe*); *Humphrey*, 4 F.3d at 318 (stay order in embedded action is not final, as "the underlying merits of the claims for relief are not resolved until arbitration is completed"); *Perera*, 951 F.2d at 785-86 (same). Because the claims still must be arbitrated, it cannot be said that the stay order in this action ended "the litigation on the merits." After the arbitration, the action will be reopened on either a motion to confirm or vacate the award in the district court, and that motion will require the district court to do more than merely execute the judgment. Only after the district court has entered judgment on the arbitral award will the litigation be terminated on the merits.

Petitioner rejects as "artificial" the distinction between dismissing an independent action and staying all claims in an embedded action pending arbitration. (Pet. 26-27.) This distinction, however, is justified by the "federal policy favoring arbitration" embodied in the FAA. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This "pro-arbitration tilt" requires the party opposing arbitration in an embedded action to "bear the initial consequence of an erroneous district court decision requiring arbitration," *Filanto*, 984 F.2d at 61; *Gammaro*, 15 F.3d at 96, and prevents "the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration." *McCarthy*, 1997 WL 471876, at *4.

In sum, the unreported summary order of the Second Circuit conflicts with no decision of any other court and otherwise raises no issue worthy of certiorari. Thus, there is no reason for this Court to address the questions presented and modify the existing and well-settled principle that orders staying an action pending arbitration in an embedded action are interlocutory orders, and thus, not immediately appealable.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-438

In The

Supreme Court of the United States

October Term, 1997

NELLIE HOWARD,

Petitioner,

v.

KATHY ANDERSON, KPMG PEAT MARWICK,
AND KPMG PEAT MARWICK LLP,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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5 pp

1. Respondents are misleading the Court. Question 1 in the Petitioner's petition, filed September 2, 1997, ("Petition") presents only the issue whether the *Second Circuit* was correct in applying *any portion* of the Federal Arbitration Act ("FAA") in making its determination concerning Respondents' Motion for Dismissal for Lack of Jurisdiction. Contrary to Respondents' Brief in Opposition ("Brief"), Petitioner is *not* asking the Court to review the merits of the District Court case. Even a cursory reading of the Petition by Respondents would have revealed this.

The appealability rule for orders issued in respect of the FAA is unusual in that the rule has been placed in the FAA itself (in Section 16 of the FAA). Because the appealability rule for orders issued in respect of the FAA is in the FAA itself, the Second Circuit could not have granted Respondents' motion to dismiss Petitioner's appeal for lack of jurisdiction pursuant to the appealability rule in the FAA (which Respondents concede) without first assuming that the FAA applied to the arbitration agreement in her employment contract with Respondents. Thus, Petitioner may properly present to the Supreme Court the issue whether the FAA applies to the arbitration agreement in her employment contract with Respondents. Contrary to Respondents' assertions, Petitioner's arguments in the Petition concerning the applicability of the FAA to the arbitration agreement in Petitioner's employment contract concern issues relevant to the Petition and properly before the Court.

Section 1 of the FAA contains the following exception: "*nothing herein contained [that is, nothing in the FAA]* shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate

commerce." Emphasis added. Thus, Petitioner's arguments in Section 2C of the Petition, regarding whether Petitioner's employment contract falls within this exception, concern issues relevant to the Petition and properly before the Court.

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 35 (1991), states that, where the Petitioner meets her burden, the applicability of the FAA to her claims is "precluded." Thus, Petitioner's arguments in Section 2A of the Petition, regarding whether she has met this burden, concern issues relevant to the Petition and properly before the Court.

Where the "knowing and voluntary" standard in the legislative history of Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081, endorsed by the Ninth Circuit in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied,* 116 S. Ct. 61 (1995), and *Renteria v. Prudential Insurance Co. of America*, 113 F.3d 1104 (9th Cir. 1997), is satisfied, Title VII (at 42 U.S.C. 2000e *et seq.)* trumps the FAA. Thus, Petitioner's arguments in Section 2B of the Petition, regarding whether her arbitration agreement was knowingly entered into, concern issues relevant to the Petition and properly before the Court.

Section 1 of the Petition discusses the extreme importance of the Supreme Court granting certiorari on the issue of the applicability of the FAA to arbitration agreements in employment contracts. This case points out that the issue of the applicability of the FAA to arbitration agreements in employment contracts is raised even in determining the appealability of a district court order that addresses the issue of the arbitrability of claims arising out of employment disputes. Considering the number of cases involving claims arising from employment disputes in which

employers have sought arbitration and the ease with which courts apply the appealability rule in the FAA to deny appeals from orders arising from these actions, it is easy to see that even this general issue of appealability has a tremendous effect on employees' rights.

2. Respondents have attempted to minimize the fact that the Second Circuit's definition of "final decision," and thus that the Second Circuit's characterization of an appealable order, under Section 16(a)(3) of the FAA is in conflict with Supreme Court precedent.

When a district court issues an order staying its proceedings pending the arbitration of *all* claims, the order is a final appealable decision within the meaning of *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521, 108 S. Ct. 1945, 1949 (1988), which defines a "final decision" as one that "leaves nothing for the court to do but execute the judgment." That an immediate appeal should be allowed from an order staying proceedings pending the arbitration of *all* claims is supported by the legislative history of Section 16(a)(3) of the FAA, which parrots the language in *Van Cauwenberghe*:

> [Section 16] preserve[s] the general policy that appeals should be available where there is nothing left to be done in the district court. . . . Under present doctrine, . . . the appealability of orders that . . . stay judicial proceedings depend on accidents of procedure that do not respond to any rational needs of either appeals timing or arbitration.

Committee on the Judiciary, Section by Section analysis on S1432 (in lieu of a Committee Report), 100th Cong., 2d Sess.

134 Cong. Rec. S16,284, S19,309 (1988) (emphasis added).

3. Contrary to Respondents' contention, the issue as to what constitutes a "final decision" under Section 16(a)(3) of the FAA is far from "settled."

Courts that had previously refused to treat *any* orders in "embedded" actions as "final," under Section 16(a)(3), have begun to allow for appeals in respect of orders that are issued in "embedded" actions and that are very similar to stays pending arbitration of *all* claims (as we have in this case). *Seventh Circuit: Compare Perrera v. Siegel Trading Co., Inc.,* 951 F.2d 780, 785 (7th Cir. 1991) (an order issued in an "embedded" action can never be a "final decision") *with Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993) (a "dismissal without prejudice" of an "embedded" action is a "final decision") *and S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993) (a district court order compelling arbitration of all claims is a "final decision" even though the *same* order also stayed proceedings, in a separately docketed "embedded" case *in the district court*, pending arbitration of these *same* claims).

CONCLUSION

For the reasons stated above and in the Petition, the Petition should be granted.

Respectfully submitted,

Nellie Howard
For Herself

October 15, 1997